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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RUBEN CARMONA, Plaintiff, Cross-defendant and Respondent, v. CINDY JACOBS SOTO et al., Defendants, Cross-complainants and Appellants; WELLS FARGO BANK, N.A., Defendant and Respondent; BANK OF AMERICA, N.A., Intervener and Respondent.	2d Civil No. B259087 (Super. Ct. No. 1263876) (Santa Barbara County)

Ruben Carmona, dba R.I. Design & Construction ("Carmona"), prevailed in an action to foreclose his mechanic's lien against Cindy Jacobs Soto and Ruben Soto ("the Sotos"). We affirmed the judgment.

The Sotos appeal a post-judgment order denying their "motion to confirm priority of liens and judgment." The order declares that Carmona's mechanics lien is senior to a deed of trust that was overlooked at trial (the "November 2006 deed of trust").

Intervener Bank of America, N.A. (Bank of America), to whom the November 2006 deed of trust was assigned after judgment, also challenges the order. The order was not served with the Sotos' motion, and Bank of America contends the order violates its right to due process.

We reverse and remand for proceedings that will allow Bank of America a hearing on its claim that the mechanic's lien is equitably subrogated to its interest in the November 2006 deed of trust.

FACTUAL AND PROCEDURAL HISTORY

The Sotos bought a home in Santa Barbara in 1992. In 2002, they borrowed $223,154 from Wells Fargo Home Mortgage, Inc., secured by a deed of trust against the property ("2002 deed of trust," instrument No. 2002-0133424, recorded Dec. 23, 2002).

In June 2006, the Sotos opened a home equity line of credit with Wells Fargo Bank, N.A. ("Wells Fargo") not to exceed $250,000, also secured by a deed of trust (the "June 2006 deed of trust," instrument No. 2006-0044872, recorded June 5, 2006). The Sotos repaid both of these loans when they refinanced their home in November 2006.

In July 2006, before they refinanced, the Sotos retained Carmona to remodel their home. They signed the contract in July and Carmona began work on August 9, 2006.

Three months later, the Sotos refinanced. They borrowed $540,000 from Wells Fargo, and used the proceeds to repay the 2002 mortgage and the 2006 equity line. The new loan was secured by the November 2006 deed of trust (instrument No. 2006-0085993, recorded Nov. 2, 2006). Upon repayment, Wells Fargo reconveyed to the Sotos its interest in the 2002 and June 2006 deeds of trust.[1]

Disputes arose between Carmona and the Sotos about payment and work. In June 2007, Carmona recorded a mechanic's lien against the Sotos' property for $77,650, plus interest (instrument No. 2007-0045433, recorded June 19, 2007).

[1] Wells Fargo conveyed its interest in the 2002 deed of trust as "successor by merger to Wells Fargo Home Mortgage, Inc."

In July 2007, the Sotos opened a new line of credit with Wells Fargo not to exceed $195,000, secured by a deed of trust (the "2007 equity line deed of trust," instrument No. 2007-0052908, recorded July 17, 2007).

Carmona filed suit to foreclose the mechanic's lien, for breach of contract, quantum meruit, and recovery on an open book account. He included Wells Fargo as a defendant, and asked the trial court to declare his mechanic's lien senior to the 2007 equity line deed of trust. (Civ. Code, § 8450, former § 3134.)[2] Carmona overlooked the November 2006 deed of trust, and his counsel declared he was unaware of it.

The November 2006 deed of trust was recorded and bears the Sotos' signatures. The Sotos' counsel declared he was unaware of it. Wells Fargo answered the complaint and asserted its rights under the 2007 equity line deed of trust but made no reference to the November 2006 deed of trust. Counsel for all parties stipulated that Wells Fargo's June 2006 deed of trust (which Wells Fargo repaid and reconveyed to the Sotos a year earlier as part of the November 2006 refinance) was senior to Carmona's lien.

Carmona's complaint sought to determine the interest of "all persons having . . . any interest in the real property." When Wells Fargo answered the complaint, it was the beneficiary of the November 2006 deed of trust on the property, the funds of which had repaid the 2002 and June 2006 liens. Wells Fargo asserted equitable subrogation as its eleventh affirmative defense: "[T]his answering defendant alleges on information and belief that it paid off liens on behalf of and for the benefit of both [Carmona] and [the Sotos] and this answering defendant is therefore entitled to an equitable lien against the property." But the issue was not litigated at trial.

The trial court awarded Carmona $90,750, plus interest and costs, and declared that his mechanic's lien is preferred and prior to the 2007 equity line deed of trust. The court ordered a foreclosure sale. It declared, "Defendants and all persons claiming or to claim from or under said Defendants . . . and all persons having or claiming to have acquired any estate or interest in said premises subsequent to the

[2] Section 3134 was in effect when Carmona recorded his lien.

commencement of this action, be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said premises." We affirmed the judgment on appeal. (*Carmona v. Soto* (May 9, 2011, B220107) [nonpub. opn.].)

Subsequently, Wells Fargo assigned the November 2006 deed of trust to Bank of America. The notice of assignment was recorded in 2011.

The Sotos filed for bankruptcy protection in 2013. The priority of the November 2006 deed of trust became an issue. The bankruptcy court granted Carmona leave from an automatic stay "for the sole and limited purpose of proceeding in Santa Barbara Superior Court . . . for determination of whether [Carmona's] Mechanic's Lien has priority over [the November 2006 deed of trust]."

By then, the property had a value of $675,000 and liens against it totaling $853,920.30. The liens consisted of Carmona's $121,651.51 abstract of judgment, the $540,000 November 2006 deed of trust (now held by Bank of America), the 2007 equity line deed of trust for $159,358.27 (previously declared junior to the mechanic's lien), and a 2010 abstract of judgment in favor of American Express for $32,910.52.

A year passed, and Carmona did not ask the superior court to determine whether his mechanic's lien had priority over the November 2006 deed of trust. The Sotos filed their own "motion to confirm priority of liens and judgment" in the superior court. They asked the court to declare that the November 2006 deed of trust is senior to Carmona's judgment on the mechanic's lien, because it was recorded first. In response, Carmona argued that his mechanic's lien is senior because he began work by August 9, 2006, before the November 2006 deed of trust was recorded. (Civ. Code, § 8450, subd. (a).) The Sotos served Wells Fargo with the motion, but did not serve its assignee, Bank of America, who was lien holder of record.

The trial court denied the Sotos' motion. It found that Carmona began work "at least as early as August 9, 2006," based on his declaration and the absence of contrary evidence. It declared that Carmona's lien is senior to the November 2006 deed of trust because work commenced before November 2006. The court relied on its authority to declare the priority of liens in equitable proceedings "as a necessary adjunct

to the enforcement" of judgment and on the bankruptcy court's permission to do so. It stated, "The judgment here includes a decree of foreclosure. The title to have been conveyed by such foreclosure is necessarily dependent upon the priority of the November 2006 [deed of trust] relative to the mechanic's lien." It found that res judicata did not bar its determination because the November 2006 deed of trust was a new issue.

We granted Bank of America's motion to intervene in this appeal.[3]

DISCUSSION

The trial court had inherent power to enforce the judgment by declaring the priority of liens among competing creditors. (Code Civ. Proc., 128, subd. (a)(4); *Fansler v. Fansler* (1988) 206 Cal.App.3d 81, 86 [court had authority to look beyond the four corners of the judgment and to examine the equities as they existed between the competing creditors].) The Sotos contend the trial court abused its discretion because it modified the judgment based on intrinsic mistake. The contention misses the point. The court did not modify the judgment; it enforced it. It expressly relied on its inherent power to enforce judgments and made no findings of mistake. It was not barred by the doctrine of res judicata from determining the priority of the November 2006 deed of trust because that issue was not previously litigated or determined on the merits. (*Sukut Construction, Inc. v. Cabot, Cabot & Forbes Land Trust* (1979) 95 Cal.App.3d 527, 531 [a former judgment is not res judicata if a second action is concerned with a new title, new interests or changed circumstances].)

The trial court's determination was legally correct on the facts before it, but the record lien holder, Bank of America, was entitled to an opportunity to present its claims or defenses at the hearing. (U.S. Const., 14th Amend. [due process], Code Civ. Proc. § 389, subd. (a) [joinder of necessary and indispensable parties].)

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[3] Bank of America moved in the trial court to intervene and to set aside the order on the ground that it was not a party to the lawsuit and was not afforded an opportunity to protect its rights by asserting a claim that its lien had priority under the doctrine of equitable subrogation because the proceeds of the 2007 loan repaid senior encumbrances. When it learned of the pending appeal, it withdrew its motion.

Liens against real property generally have priority according to the time of their creation. (Civ. Code, § 2897.) In other words: first in time, first in right. (*JP Morgan Chase Bank, N.A. v. Banc of America Practice Solutions, Inc.* (2012) 209 Cal.App.4th 855, 860.) There are exceptions. A mechanic's lien has priority over other encumbrances that attach after commencement of work. (Civ. Code, § 8450, subd. (a).) And the doctrine of equitable subrogation may sometimes be applied to give a senior lien to one who was not "first in time," but advanced money to pay off a more senior lien holder.

Wells Fargo recorded its November 2006 deed of trust before Carmona recorded his mechanic's lien and was therefore "first in time," but the mechanic's lien had priority because Carmona commenced work in August 2006. (Civ. Code, § 8450, subd. (a).) Wells Fargo's assignee, Bank of America, contends it nevertheless has priority under the doctrine of equitable subrogation.

Under the doctrine of equitable subrogation, when a party advances money to pay off a senior encumbrance on real property with the understanding that the advance will be secured by a first lien on the property, but the new security is for some reason not a first lien, the party may be subrogated to the rights of the senior encumbrance if equity so requires and in the absence of inexcusable neglect. (*Simon Newman Co. v. Fink* (1928) 206 Cal. 143, 146; *JP Morgan Chase Bank, N.A. v. Banc of America Practice Solutions, Inc., supra*, 209 Cal.App.4th 855, 860.) When the Sotos refinanced their home, Wells Fargo advanced money to pay off the 2002 and June 2006 encumbrances, both of which were recorded before Carmona started work. This is the basis for Bank of America's claim for equitable subrogation.

Equitable subrogation is only available if the holder of the security is "not chargeable with culpable and inexcusable neglect," and "the superior or equal equities of others would [not] be prejudiced thereby." (*JP Morgan Chase Bank, N.A. v. Banc of America Practice Solutions, Inc., supra*, 209 Cal.App.4th 855, 860.) Bank of America has no greater rights than Wells Fargo, its assignor. (*Benson v. Andrews* (1955) 138 Cal.App.2d 123, 132.) Wells Fargo did not claim an interest under the November 2006

deed of trust at trial. It raised an affirmative defense of equitable subrogation but did not pursue it. On the other hand, Carmona also did not raise the issue and was on constructive notice of the deed. (Civ. Code, §§ 2934, 19.) Neither did the Sotos.

Is Wells Fargo chargeable with inexcusable neglect? Is any such neglect chargeable to its assignee, Bank of America? Does Carmona or do the Sotos have superior or equal equities that would be prejudiced by equitable subrogation? We leave to the trial court the task of deciding these questions.

DISPOSITION

The order is reversed and remanded for further proceedings consistent with this opinion. The parties shall bear their own costs.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Donna D. Geck, Judge

Superior Court County of Santa Barbara

Haws, Record & Magnusson, LLP, David. W. Magnusson for Defendants, Cross-complainants and Appellants Cindy Jacobs Soto and Ruben Soto.

Ruben Carmona, in pro. per, for Plaintiff, Cross-defendant and Respondent.

No appearance for Defendant and Respondent Wells Fargo Bank, N.A.

Fidelity National Law Group, Susan Marie Hutchison for Intervener and Respondent Bank of America, N.A.